United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1145

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARLOS PEREZ,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Carlos Perez appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on April 2, 1975, after a four-day trial before the Honorable Charles E. Stewart, United States District Judge, and a jury.

Indictment 74 Cr. 1045, filed November 7, 1974, charged Perez and Aurora Laboy in one count with distributing and possessing with intent to distribute approximately one ounce of cocaine on March 14, 1974 (Title 21, United States Code, Sections 812, 841(a), 841(b)(1)(A) and Title 18, United States Code, Section 2).

The trial commenced on February 26, 1975 and concluded on March 6, 1975, when the jury found Perez and Laboy guilty.

On April 2, 1975, Perez was sentenced to three years imprisonment; Laboy was sentenced to two years imprisonment. Both terms of imprisonment are to be followed by three years special parole.

Both Perez and Laboy are presently serving their sentences. Only Perez has appealed his conviction.

Statement of Facts

Government's Case

On March 11, 1974, Ramon Acevedo, arrested for violating federal narcotics laws, immediately agreed to cooperate as an informant (Tr. 153, 156, 160, 166, 172-173, 177).*

On the morning of March 13, 1974, Acevedo met Laboy, whom he had known for a year, on 96th Street between Broadway and Amsterdam Avenue (Tr. 34-36). During that coincidental meeting Laboy asked Acevedo if he wanted any cocaine (Tr. 36, 39, 155-156). Acevedo responded that he wanted none but that he had an Italian customer who might want either an ounce or an eighth of a kilogram of cocaine. Laboy told Acevedo that a "pure" ounce would cost $1,200 and an "eighth" (one-eighth of a kilogram) would cost $4,000. Acevedo told Laboy he'd contact her at her apartment if his customer was interested (Tr. 36-39).

On March 14, 1974, at about 1 P.M., Acevedo went to Drug Enforcement Administration (hereinafter D.E.A.) Headquarters and met with Special Agent Robert Nieves and Michael Gray (Tr. 40). After Acevedo recounted

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* "Tr." refers to the trial transcript; "App. Br." refers to appellant's brief; "GX" refers to Government Exhibit.

his conversation with Laboy, Gray told Acevedo both to get a sample of the cocaine and to arrange a meeting for Gray that evening (Tr. 246-274). About 3 P.M., when Acevedo arrived at Laboy's apartment at 514 West 110th Street, he met both Laboy and, for the first time, Perez (Tr. 43). Acevedo said he had spoken to his Italian customer (Tr. 44). Perez informed Acevedo that while Perez' people sold only "eighths" of cocaine, possibly he, Perez, could obtain an ounce (Tr. 44). Acevedo asked Laboy and she, in turn, asked Perez whether Perez had a sample of cocaine he would give Acevedo (Tr. 87). Perez gave Acevedo a sample of cocaine (Tr. 44, 123; GX 1).* Acevedo said that perhaps his customer would be ready for 7:30 that evening and then left Laboy's apartment (Tr. 45).

At about 4 P.M., Acevedo gave the sample to Agent Kieran Kobell in the presence of Gray at D.E.A. Headquarters (Tr. 45-46, 248-251). Gray instructed Acevedo to return to D.E.A. Headquarters by 7:30 P.M. Acevedo re-visited Laboy's apartment at 5:30 P.M. to confirm the prior arrangements but neither Laboy nor Perez was there and Acevedo met instead a man who said he was Laboy's brother (Tr. 46).

At about 7:30 P.M., Gray, Nieves and other agents, having obtained Acevedo's permission, placed a kel transmitter on Acevedo and searched Acevedo and his car for any contraband (Tr. 48, 202-204, 252). Gray and Acevedo drove in Acevedo's car to the vicinity of Laboy's apartment building; they arrived at about 8:30 P.M. (Tr. 49, 204-205, 252). Nieves, having arrived in the vicinity 10 minutes earlier, turned on the kel receiver as Gray and Acevedo

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* It was stipulated that if Edward Manning, a forensic chemist for the Drug Enforcement Administration were called, he would testify that the powder received by Acevedo was cocaine (Tr. 366-369; GX 5).

entered the Laboy building; he both overheard and recorded the ensuing conversation (Tr. 208).*

When Laboy opened her apartment door, she was frightened for Acevedo had brought Gray directly to her apartment; she calmed down however, when Acevedo said he had known Gray for a long time (Tr. 50, 253; GX A. A-1). After Gray was introduced as the Italian Acevedo had described previously, Gray said he wanted to purchase an ounce of cocaine; Laboy said their cocaine source did not want to break up an "eighth" for an ounce (Tr. 52, 253-255; GX A, A-1). However, she said, she did have an ounce there (GX A, A-1). Perez explained that he had brought an ounce which would cost Gray $700 but the ounce wasn't pure, although it could be diluted further about one and one half times (Tr. 51, 255-256; GX A, A-1). Perez handed Gray the cocaine (Tr. 145; GX 2).** Laboy and Gray talked about buying an eighth but Gray explained he first wanted to see how good the ounce he had was (Tr. 54; GX A, A-1). Gray asked for a glass of water to test the cocaine and Laboy got him one (Tr. 52, 256-257; GX A, A-1). Then Gray weighed the cocaine on a scale Perez

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* Nieves maintained custody of the resulting cassette recording (GX A) which was thereafter transcribed (GX A-1). The transcription reflected the original language, both Spanish and English, on the left hand side of the page and the corresponding English translation on the right hand side of the page. Acevedo, Nieves, and Gray testified that the transcription was accurate (Tr. 57-59, 208, 263-64). It was stipulated (GX A-2) that the transcription was true and accurate and the translation from Spanish into English was true and accurate. The cassette recording was played first upon its introduction into evidence (Tr. 95), and a second time after the jury was asked by the court if they wished to hear it again (Tr. 97), and, finally, a third time, upon the jury's request, during the course of the jury's deliberations (Tr. 469-470).

** As similarly noted previously, it was stipulated at trial that a forensic chemist would testify that the powder was cocaine (Tr. 366-369; GX 5).

provided (Tr. 257-258). Gray tried to lower the price, and Perez advised Gray to feel the "rocks" (Tr. 53; GX A, A-1). Perez said he used to sell ounces and the one Gray had was a good ounce (GX A, A-1). Gray agreed to pay $700, counted the money, and gave it to Laboy, who thanked him and then gave all or most of the seven hundred dollars to Perez (Tr. 53-54, 256, 260; GX A, A-1). Gray gave them a phone number to contact him during the following week so that they could sell him an "eighth"; Perez wrote the number down (Tr. 54, 258; GX A, A-1).

On the afternoon of March 15, while Gray was engaged in another investigation, he happened to meet Laboy at the intersection of Broadway and 110th Street (Tr. 264-265). Nieves was also working with Gray and saw Gray meet Laboy (Tr. 209). Gray told Laboy the ounce was satisfactory and reiterated that he would purchase the "eighth" the following week (Tr. 265).

On March 20, Laboy called Gray to arrange the purchase earlier discussed; Gray said he didn't want to talk on the phone (Tr. 266-267). Gray went to her apartment a half hour later and said he was ready to purchase the "eighth". Perez said that it would be "pure" and would cost $4,000 (Tr. 268). As Perez sat there, Laboy told Gray the "eighth" would be available the following day and provided Gray with a sample she retrieved from beneath her blouse (Tr. 268-269; GX 3).* After Gray left, Perez and Laboy left and walked to 204 West 106th Street; Agent Kierman Kobell followed them and, in addition, photographed them en route (Tr. 261, 269, 352-361; GX B, B1-B5).

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* The "impure" ounce (GX 2) received by Gray on March 14th, according to the stipulation contained 20.2 per cent cocaine hydrochloride and dilutants sugar and borates; the "pure" sample (GX 2) received on March 20th contained 84.6 per cent cocaine hydrochloride and dilutant sugar (GX 5).

On the afternoon of March 21, Gray returned to Laboy's apartment building, but Laboy did not answer her downstairs buzzer (Tr. 278). Gray saw Perez, hailed him and asked him if "they" were ready to sell the "eighth". Perez said there was no problem. Gray and Perez both tried Laboy's buzzer to no avail. They then returned to Gray's car, when he showed Perez the $4,000. They unsuccessfully tried the buzzer again and then Gray drove away (Tr. 279). Kobell had observed what occurred, and after Gray left, watched Perez make a call in a public booth and then followed Perez once again to 204 West 106th Street and then to the Flamingo Restaurant on 96th Street (Tr. 263-363).

Soon after the March 21st meeting, Perez told Acevedo in Laboy's presence that he and Laboy were afraid that Gray was an agent because Gray had come on March 21 with $4,000 in cash when Gray did not know them well (Tr. 55-56).

Nevertheless, on April 1, Laboy again called Gray to arrange a 2 P.M. meeting for April 2 in front of the American Restaurant at 69th Street and Broadway in order that they might conclude their "eighth" deal (Tr. 280-282).

On April 2, Nieves was in the vicinity of the American Restaurant on a surveillance detail and he saw Perez and Laboy; however, after a short time they left the area (Tr. 209-211). Soon after, Perez and Laboy told Acevedo that they went to meet Gray on April 2 but left the area before Gray arrived because they saw a car with three or four agents following them (Tr. 56-57). On May 7, Perez told Gray that he and Laboy did not meet Gray on April 2 because they saw police in the area (Tr. 283-284).

Defense Case

Neither Perez nor Laboy offered any evidence.

ARGUMENT

The District Court's denial of defendant's motion to sever was not an abuse of discretion.

Perez argues that the District Court's denial of his motion to sever was an abuse of discretion. When the motion to sever was made in the District Court, the basis for the motion was that each defendant intended to testify exculpating himself (or herself) and inculpating the other defendant, thereby severely prejudicing defendants if tried jointly. The motion, joined by both defendants, was denied. Neither defendant testified at trial. The issue raised for the first time on appeal is that the joint trial caused Perez "to forego his cardinal right to testify in his own behalf . . ." (App. Br. 7).* The argument, whether framed as it was in the District Court or as it is before this Court, is entirely without merit.

On February 26, 1975, the afternoon before trial commenced, counsel for Perez and Laboy told the court for the first time that their respective clients intended to testify exculpating themselves and implicating each other. They jointly moved for a severance pursuant to F.R. Cr. P., Rule 14. Neither Perez nor Laboy, in support of their motion, described concretely the nature of their proposed testimony. No affidavits were submitted. No substantive oral statements by the defendants or by their counsel were made on the record. The Court reserved decision and requested counsel to provide the court the next day with legal authority in support of their severance motion. On February

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* Perez was purportedly advised not to take the stand because Laboy might testify (App. Br. 6). The district court was never informed, nor is there any suggestion in the record, that Perez was so advised or, more importantly, that Perez decided, based on this advice, not to testify.

27, 1975, the court, after a brief discussion, denied defendants' severance motion (Tr. 4).*

Perez claims that, due to the resultant joint trial, Laboy asked questions during cross-examination (Tr. 117-123, 132-133, 144-146) which were prejudicial (App. Br. 6-7). The alleged prejudice is, if it exists at all, certainly negligible since Laboy's questions on cross-examination merely evinced testimony repetitive of Acevedo's direct (Tr. 44-45, 50-51, 53-54).

Perez also asserts that he was kept off the stand because Laboy threatened to testify implicating him if he should testify. Putting aside for the moment whether Perez would be so prejudiced as to require severance, the record reflects the fact that Laboy apparently decided half way through trial, certainly before Perez had reached his decision that she would not testify. Partway through the Government's case, after Acevedo and Nieves had testified, Laboy's attorney told the court that Government's Request Number 17, the "interest of a testifying defendant" was "not going to be applicable" (Tr. 238). On March 5, 1975, after the

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* The single authority Perez cited, *United States* v. *Valdez*, 262 F. Supp. 474 (D. Puerto Rico, 1967) is fully discussed in a subsequent footnote. It is interesting to note that Perez' counsel conceded just before the court's decision that "the mass of authorities, most of the judges, have held that [the averred basis for the instant motion] is not sufficient ground for a severence" (Tr. 2). Laboy cited no authority.

While defense counsel provided no description of defendants' possible testimony, the Court was fully aware, when denying defendants' severance motion, of the circumstances of, including defendants' respective roles in, the ounce sale on March 14th. The previous day, the Court had listened, during the course of an audibility hearing, to the cassette recording of the March 14th meeting (Tr. 2-26-75 at 6-12; GX A). The tape, as reflected by the statement of the government's case, *supra*, is an almost complete record of the transaction for which defendants were jointly charged.

Government had rested, Perez' counsel said in the robing room, in Perez' presence, that it was his understanding that Laboy would present no evidence in her defense (Tr. 370). Perez' counsel said that, "as of [that] moment", Perez had not yet made up his mind about testifying (Tr. 370). Laboy's counsel, before Perez did make up his mind, confirmed that she would present no defense case (Tr. 371). Laboy concurred, saying she would not testify (Tr. 371). Only after Laboy decided that she would not testify, did Perez inform the court that he would not testify (Tr. 371).

It is presumed that defendants properly named in the same indictment should be tried together. *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *United States* v. *Pacelli*, 366 F.2d 259 (2d Cir.), *cert. denied*, 385 U.S. 948 (1966). A motion to sever defendants is directed to the sound discretion of the trial court. *Opper* v. *United States*, 348 U.S. 84 (1954); *United States* v. *Calabro*, 467 F.2d 973, 987 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973). The trial court enjoys wide discretion in the matter of granting or denying separate trials, and its decision "will be set aside only upon a clear showing of abuse of discretion." *United States* v. *Jenkins*, 469 F.2d 57, 68 (2d Cir. 1974); *United States* v. *Projansky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972). That Perez might have had a better chance of acquittal by being separately tried, a questionable proposition at best given the overwhelming evidence, is plainly insufficient to justify severance; to have denied Perez severance based only on the sanguine projections of defense counsel was hardly an abuse of discretion. *United States* v. *Cassino*, 467 F.2d 610, 622-623 (2d Cir. 1972), *cert. denied*, 410 U.S. 913, 928, 992 (1973); *United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir.), *cert. denied*, 402 U.S. 999 (1970), quoting *Tillman* v. *United States*, 406 F.2d 930, 935 (5th Cir.), *vacated as to one defendant on other*

grounds, 395 U.S. 830 (1969). Perez must instead demonstrate that he was severely prejudiced by the joinder such that he, in effect, was denied a fair trial altogether. *Calabro, supra; Borelli, supra; DeSapio, supra; United States* v. *Crisona,* 271 F. Supp. 150, 154 (S.D.N.Y. 1967).

Before proceeding to discuss further the merits of Perez' claim on this appeal, it must be noted that when the severance motion was first made in the District Court, Perez failed to present specific affirmative evidence by way of affidavit, deposition, prior testimony, or for that matter, by offer of proof that the joinder was or would become "severely prejudicial." There was instead merely counsel's bald assertion describing Perez and Laboy's defense as antagonistic and prejudicial. This mere assertion was inadequate; the Court need not grant a severance based on the unsupported possibility that testimony, not specifically described, may be forthcoming. *See, United States* v. *Bumatay,* 480 F.2d 1012, 1013 (9th Cir. 1973); *United States* v. *Thomas,* 453 F.2d 141, 144 (9th Cir. 1971), *cert. denied,* 405 U.S. 1069 (1972); *Byrd* v. *Wainwright,* 428 F.2d 1017, 1021 (5th Cir. 1970); *United States* v. *Snelling,* 403 F.2d 627, 628 (4th Cir.), *cert. denied,* 394 U.S. 932 (1969); *United States* v. *Carella,* 411 F.2d 729, 731-732 (2d Cir.), *cert. denied,* 396 U.S. 860 (1969); *United States* v. *Echeles,* 352 F.2d 892, 897 (7th Cir. 1965); *United States* v. *Gleason,* 259 F. Supp. 282, 283 (S.D.N.Y. 1966). But, even assuming the basis for the motion was adequate, the burden, that Perez was "severely prejudiced", has still not been met. Merely antagonistic defense, assuming they were made out here, do not require the granting of a severance:

> "* * * The mere fact that there is hostility between defendants or that one may try to save himself at the expense of another is in itself alone not sufficient grounds to require separate trials. It is only when the situation is such that the exercise of common sense and sound judicial judgment should lead

> one to conclude that one defendant cannot have a fair trial, as that term is understood in law, that a severance should be granted."
>
> *Dauer* v. *United States*, 189 F.2d 343, 344 (10th Cir.), *cert. denied*, 342 U.S. 898 (1951).

See United States v. *Jenkins*, *supra*, 496 F.2d at 68; *United States* v. *Perez*, 489 F.2d 51, 68 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974); *United States* v. *Troutman*, 458 F.2d 217 (10th Cir. 1972); *United States* v. *Addonizio*, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); *United States* v. *Bornstein*, 447 F.2d 742 (7th Cir. 1971); *United States* v. *Mazzella*, 295 F. Supp. 1033 (S.D.N.Y. 1969); *United States* v. *Turner*, 274 F. Supp. 412 (E.D. Tenn. 1967); *United States* v. *Steffer*, 228 F. Supp. 491 (D.C. Mont. 1964).

Perez' severance motion was grounded below on the alleged prejudice of co-defendant Laboy taking the stand for herself and against Perez. In *United States* v. *Joyce*, 499 F.2d 9 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974), defendant Wallace took the stand against co-defendant Joyce and blamed the scheme on co-defendant Joyce. Joyce appealed the denial of his severance motion. The Seventh Circuit held that Wallace's testimony against Joyce was an "insufficient reason" to require a separate trial. *Id.* at 21. *See also*, *United States* v. *Hutul*, 416 F.2d 607, 620 (7th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970); *United States* v. *George*, 477 F.2d 508, 515 (7th Cir. 1973). In this case, had Laboy taken the stand against Perez, there is nothing in the record which even remotely suggest a different result.* Assuming, *arguendo*, that Perez decided

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* The only case cited by Perez as authority is a lower court decision, *United States* v. *Valdes*, 262 F. Supp. 474 (D. Puerto Rico 1967). Not only is the decision curious, it is distinguishable. In *Valdes*, the nature and circumstances of co-defendant

[Footnote continued on following page]

to remain off the stand to avoid his co-defendant's accusation,* his decision, as the above discussion demonstrates, was a tactical one. No constitutional right was foregone by Perez since no prejudice sufficient to merit severence could have inured as a result of Laboy taking the stand. And it must be noted that the assumption that Laboy kept Perez off the stand is entirely speculative in light of the fact that Perez remained off the stand even after he knew Laboy was not going to testify and made no claim then that his reason for doing so was fear that Laboy would reverse field, testify and incriminate him.

The remaining consideration raised by Perez is not speculative. Was Perez prejudiced by the Laboy's actual defense at trial as opposed to Laboy's arguably possible defenses? A *fortiori*, it must be clear that Perez could not be severely prejudiced by mere inconsistency in defenses provided there was "an evidentiary basis enabling the jury to decide each case separately." *United States* v. *Jenkins*, *supra*, 496 F.2d at 68 (2d Cir. 1974); *United States* v. *Addonizio*, *supra*, 451 F.2d at 63.

Vega's "severely prejudicial" defense, unlike Perez' application, was made explicit to the court; regrettably the nature of the Vega defense is not even hinted at in the court's decision. The District Court concluded, based on representations by Vega's counsel, a letter from Vega which within the court's opinion, 262 F. Supp. at 476, contained "statements that may be considered as highly prejudicial" to Valdes, and the deposition of a Salvad Hernandez who exculpated Vega and inculpated Valdes, that a joint trial would deny Valdes a fair trial. The record in this case is barren of any similarly explicit statement(s) by Perez.

* This assumption requires considerable imagination. Allegedly Laboy was going to take the stand and put the blame for the offenses charged on Perez. Exactly how she could have done so, or even have supposed that she might do so, has yet to be explained, hardly surprisingly in view of the fact that the evidence against Laboy was such—the direct testimony of four witnesses and a tape recording of the transaction on March 14—that there was no plausible way that she could have exculpated herself even by blaming Perez.

First, there was no significant inconsistency between the Perez and Laboy defenses. Laboy's defense was: (1) that the testimony of Gray and Acevedo was so flawed it should be discarded, and (2) that Laboy's participation was unknowing and merely as a helpful interpreter for her friend Perez. Perez defense was restricted to Laboy's first point. The Laboy defense was implemented primarily by evincing testimony on cross merely repetitive of the witness' direct. While Laboy did in brief portions of cross-examination and in her summation emphasize Perez' role in the case, she added nothing to what was already in the record incriminating Perez, and her weak attempts along this line—given the proof against Perez—were of no meaningful significance.

Second, there was an evidentiary basis to decide the guilt of each defendant separately. The evidence, comprising primarily testimony by Acevedo, Gray, Nieves, Kobell and the tape, was overwhelming. The evidence demonstrated vividly that on March 13th and 14th Laboy was not merely a friendly interpreter. Laboy solicited Acevedo, interpreted for Perez, negotiated with Gray, provided water for Gray to test the cocaine and received and passed money from Gray to Perez. On these same dates, Perez provided both a sample to Acevedo and an ounce to Gray, described the ounce's impurity to Gray, discussed prospective sales of "eighths", provided a scale for Gray, received the money from Laboy and referenced Gray's telephone number. And there were in addition, the events of March 20 and 21, April 2 and May 7.

Finally, the ultimate test perhaps, is whether the jury followed the admonitory instruction of the Court and appraised independent evidence against each defendant solely upon the defendant's own acts, statements and conduct. Any contention that in this relatively simple transaction the jury confused defendant Laboy and Perez takes "insufficient account of the intelligence and conscientiousness of the jury, the effective effort of the judge, the skill of de-

fense counsel. . . ." *Desapio, supra*, at 280. The jury was instructed about individual culpability in the *voir dire* before they were empanelled. The Court in its charge (Tr. 453) clearly instructed, and counsel during his summation (Tr. 398) argued, that guilt was personal. There was, therefore, no prejudice meriting severance as a result of these "inconsistent" defenses not adequately dealt with by the instructions by the Court and overcome by the weight of the evidence; and if there was any error, in view of the overwhelming evidence it was a harmless one.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN P. FLANNERY, II,
JOHN D. GORDAN, III,
Assistant United States Attorneys, Of Counsel.

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

John P. Flannery II being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20th day of June, 1975 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Howard L. Jacobs, Esq
401 Broadway
New York, N.Y.

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John P. Flannery II

Sworn to before me this
20th day of June, 1975
Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977